

DEPARTMENT OF STATE REVENUE

**SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 97-0277 CSET
Controlled Substance Excise Tax
For The Tax Period Of March 25, 1997**

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ISSUES

I. Controlled Substance Excise Tax - Liability

Authority:

Indiana Code § 6-7-3-5.

Bryant v. Indiana Department of State Revenue, 660 N.E.2d 290 (Ind.1995).

Hayse v. Indiana Department of State Revenue, 660 N.E.2d 325 (Ind.1995).

Baily v. Indiana Department of State Revenue, 660 N.E.2d 322 (Ind.1995).

Clift v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind.1995).

Hall v. Indiana Department of State Revenue, 660 N.E.2d 319 (Ind.1995).

The taxpayers protest assessment of controlled substance excise tax.

STATEMENT OF FACTS

On March 29, 1996, the Brownsburg Police Department received information that an area youth had purchased marijuana from the taxpayer. The police meet with three youths. The young man who initially contacted the police (hereinafter referred to as "Brad") reiterated to the police that his friend, (hereinafter referred to as "Bryan") had purchased a "bud" of marijuana from the taxpayer, but he took the marijuana from Bryan and had "flushed it down the toilet". Brad stated that, on numerous occasions, he had seen marijuana and partially smoked marijuana cigarettes in the taxpayer's residences, and that he had also seen marijuana "buds" in an orange Tupperware® bowl and in two large glass Mason® jars. The police also questioned Bryan who stated that he had purchased an "eighth"(one eighth of an ounce) for twenty-five dollars (\$25.00) from the taxpayer

that morning, and that he had, during the two previous weeks, purchased two “eighths” from taxpayer. Bryan corroborated Brads statements that the taxpayer kept marijuana “buds” in two glass Mason® jars, and a red[sic] Tupperware® bowl, and had seen partially smoked marijuana cigarettes in the taxpayer’s residence before. Additionally, the police questioned the third youth (hereinafter referred to as “Heather”) who stated that she had been at the taxpayer’s residence numerous times and had seen the taxpayer smoking marijuana, and that she had seen Zig-Zag ® rolling papers and a book on growing and harvesting marijuana there too. Heather also corroborated the story that the taxpayer kept two large glass Mason® jars containing marijuana buds and an orange Tupperware® bowl also containing marijuana, as well as smaller packages of marijuana for resale. All three youths confirmed their familiarity with marijuana, saying that they could identify it by sight and smell. All three informants reduced their statements to writing and gave them to the police.

Based on the information provided by the informants, the Brownsburg Police obtained a search warrant for the taxpayer’s residence, which they executed on the evening of March 29, 1996. As a result of the search, the police discovered suspected marijuana in several places in the residence of the taxpayer as described by the informants, seized the suspected marijuana, and arrested the taxpayer and his wife for possession of marijuana over thirty (30) grams. The suspected marijuana was tested and weighed and was in fact marijuana weighing 53.97 grams. The Department issued a jeopardy assessment against the taxpayer and his wife on March 25, 1997. The taxpayer and his wife, by counsel, timely protested assessment, and later requested, in lieu of a hearing, to submit a written brief on or before August 8, 1997. Taxpayers’ counsel failed to file any written submission, and accordingly a written letter of findings was issued. A rehearing was granted to the taxpayers because they were not informed of the prior hearing or letter of findings. Additional facts are provided in the subsequent sections.

I. Controlled Substance Excise Tax - Liability

DISCUSSION

It is the law in Indiana that the manufacture, possession or delivery of marijuana is taxable, IC 6-7-3-5. See *Bryant v. Indiana Department of State Revenue*, 660 N.E.2d 290 (Ind.1995). *Hayse v. Indiana Department of State Revenue*, 660 N.E.2d 325 (Ind.1995). *Baily v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995). *Cliff v. Indiana Department of State Revenue*, 660 N.E.2d 310 (Ind.1995). *Hall v. Indiana Department of State Revenue*, 660 N.E.2d 319 (Ind.1995). The Department assessed tax against the taxpayer and his wife, and demanded payment. Indiana law specifically provides that notice of a proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid, IC 6-8.1-5-1(b). The taxpayers, now bear the burden of proving that the proposed assessment is wrong, *Id.*

Under the above stated statutory test, the Department is now only called on to make a narrow factual decision. That decision is whether taxpayer showed, by a preponderance of evidence, that he did not manufacture, possess or deliver the marijuana seized from his

residence. The Department does not judge whether the police had probable cause for the search, seizure or for any action taken during the course of the police investigation. That is not within the purview of the Department's administrative authority, but is left to another competent tribunal. Further, the Department presumes the constitutionality of its assessment, and all statutes applied to the taxpayer in this matter.

At hearing, the taxpayer revealed that the evidence against him in the criminal proceeding was suppressed because it was obtained in violation of the 4th Amendment of the United States Constitution, and Article 1 § 11 of the Indiana State Constitution of 1851. There is no requirement in Indiana law that the suppression of evidence also requires the waiver of Controlled Substance Excise Tax ("CSET"). In fact, such cases are evaluated on a case by case basis like any other CSET matter. Therefore, the Department turns to the specific facts of this case in rendering its holding.

As stated in the facts above, the police obtained the search warrant based on the statements of three informants. Taxpayer asserted that the marijuana on which the CSET was imposed was not his, but had been planted there by one of the informants, Brad, who had a vendetta against him. Brad had sought the affections of the taxpayer's daughter who was, at that time, 13 years of age. Taxpayer, to put it mildly, objected to Brad's designs on his daughter. Apparently, taxpayer's daughter was a friend of all three informants and that is how they gained access to taxpayer's home, often in his and his wife's absence. In support of his defense, the taxpayer provided the Department with a transcript of the hearing to suppress. The transcript showed that at the time of the hearing to suppress, one informant, Brad, was in custody of the State for some nefarious activities. The other informants, namely Bryan and Heather, while under oath, recanted their statements in open court, stating they had made the statements under duress by Brad.

Specifically, the direct examination of Bryan reveals that Brad bore a grudge against the taxpayer because of Brad's relationship with taxpayer's daughter. Bryan stated in answer to why he and Brad had discussed the taxpayer on or about March 29, 1996, Brad responded:

- A. "Because it was supposedly [sic] he was the one that was going to press charges against Brad"
- Q. "Okay, did there come a time when you were with [Brad] that he called the police department?"
- A. "He called them from my house because he was upset and wanted to get even."

When questioned on direct examination about the veracity of the statement he made to the police Bryan stated:

- Q. "Okay, the information that you put in the statements was that information true?"
- A. "The first statement, no it was not"

- Q. "Okay, uh, is it true that you've never observed any marijuana in the taxpayer's household?"
- A. "Yeah, I did observe one time a roach but that could have been from anybody."
- Q. "Okay, but you didn't know if that was even marijuana, do you?"
- A. "No."
- Q. "Um, you were never sold marijuana by the taxpayer were you?"
- A. "No."
- Q. "They've never offered to se[ll] you marijuana?"
- A. "No, I've never – I only met 'em once. . .
- Q. "You never saw any plastic containers that - -
- A. (Interposing) "No."
- Q. "--looked like substance? Okay, uh, were these statements that you made and gave to the police, were these things that [Brad] told you to tell the police?"
- A. "Yes"
- Q. "You Came forward later on to the Prosecutor's Office, did you not?"
- A. "I think so, yeah."
- Q. "And you gave a retraction of this statement voluntarily, is that correct?"
- A. "Yes. . . ."

Similarly, when Heather was questioned about the events of the afternoon of March 29, 1996, She also stated that Brad bore umbrage against taxpayer. Specifically she said:

I had come home from school and a friend of ours had through the grapevine heard that [taxpayer] was going to get [Brad] in trouble for statutory rape for his daughter and Brad said that, well I'll get him before he gets me. So he calls the police and said that he was going to make an anonymous phone call to get [taxpayer] in trouble for marijuana.

When questioned about the statement she had give to the police, Heather stated:

- Q. Okay, so it's true that then that you've never smelled marijuana in [taxpayer's] residence?
- A. That's correct.
- Q. You've never seen marijuana in the [taxpayer's] residence?
- A. That's correct.
- Q. Have you known [Brad] to possess marijuana?
- A. Yes, I have.

Heather also revealed that she participated in Brad's scheme for revenge because he had threatened to kill her or, in Heather words "be beaten upon where no one would recognize me."

Taxpayers further revealed in hearing that on March 29, 1996, he and his wife were not even at home, but were in Monroe County closing on some real estate they had recently purchased, contrary to Bryan's assertions that he had purchased marijuana from taxpayer that day.

It appears more probable than not from the totality of the evidence, that taxpayer and his wife did not possess, manufacture or deliver the marijuana on which the CSET was assessed, based on the evidence presented that the marijuana may well have belonged to a person who bore malice against the taxpayer.

FINDINGS

The taxpayer is sustained.